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Supreme Court of the United States

OCTOBER TERM, 1945

H. SMITH RICHARDSON
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The undersigned, on behalf of H. Smith Richardson, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 196) is reported in 151 F. (2d) 102. The opinion was written by a judge who did not concur in the judgment on the two issues which are presented by this petition. The opinion of the single judge of the Tax Court (R. 43) is not reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 17, 1945. (R. 205.) A petition for rehearing was duly filed, and was denied on September 25, 1945. (R. 212.) The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

I

1. Whether the judge of the Tax Court applied the proper standard of law in determining the value of closely held stock for federal gift tax purposes, when there had been no sale of the stock, and no weight was in fact given in determining the value to any other factor than the value of the assets owned by the corporation in question.

II

2. Whether the failure to exercise in 1932 through 1935 a power to take the corpus of a trust fund *established by another person* constituted gifts by the petitioner of the income from the corpus within the proper construction of § 501(a) of the Revenue Act of 1932.

3. Whether failure to exercise such a donated power was a release of the power with respect to the income, within § 452(c) of the Revenue Act of 1942, as amended, which provides that "A release of a power to appoint before July 1, 1946, shall not be deemed a transfer of property by the individual possessing such power."

Statutes and Regulations Involved

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 18-25.

Statement

The facts involved may be summarized as follows:

I

On December 20, 1935, the petitioner created five trusts, one for each of his five children. (R. 19-20; 43-44.) He transferred to these trusts 5,100 shares of stock in Piedmont Financial Company, Inc. (R. 20, 44.) The first question raised involves the value to be fixed for this Piedmont stock.[1] The stock had never been listed on any market. (R. 49, 60.)

The Commissioner fixed a value of $95.509 for each Piedmont share. (R. 12.) This was apparently derived by taking the value of all of Piedmont's assets, or $9,808,599.27 (R. 24), and deducting an amount of $257,699.27 for taxes and expenses, leaving a net calculated value for the assets of Piedmont of $9,550,900. Dividing this by 100,000, the number of shares outstanding, gives a value of $95.509 for each share.

The petitioner contended that the value of the stock was not more than $53.44 per share. In support of this position, the petitioner called three expert witnesses, who developed the factors and bases which they took into account in arriving at a valuation for the stock, in terms of the price which would be paid for the stock by a willing buyer to a willing seller, and other relevant factors. The judge

[1] In the court below, a question was also raised as to the valuation of a large block of stock in Vick Chemical, Inc., which was given to the same trusts. This question is not presented in the present petition. This is because this Court has recently denied a petition by the Government raising the same issue (*United States* v. *Havemeyer*, No. 388, October Term, 1945), and because the court below in its opinion regarded the issue as turning on "deficiencies in the proofs." (R. 199.) We think that this view is wholly unsupported by the record, but we recognize that the question whether it is, or not, is not one which this Court should be asked to review.

of the Tax Court, however, disregarded all of this evidence. The standard which he applied in valuing the stock appears from his statement that the Piedmont stock "can only be valued in any real or practical way by primarily considering the value of the securities owned by the corporation. Any other approach would, in our opinion, be futile." (R. 61.) On this basis, he determined that the value of the Piedmont stock was "not less than $95.509 per share." (R. 54.)

The Circuit Court of Appeals affirmed this decision. The judge who wrote the opinion felt "substantial doubt" (R. 201) as to whether the proper standard had been applied, and favored a remand of the case to the Tax Court. The majority of the court, however, without any discussion at all, affirmed the decision below. (R. 202.)

II

The other issue has no relation to the valuation question.

In 1932, Grace Jones Richardson, the petitioner's wife, created five trusts, one for each of her five children. (R. 20-21, 25-32.) Article *Eleventh* of each of these trusts gave the petitioner power to terminate the trust and take the principal or corpus for his own benefit. The five trusts were in existence in 1935, and no exercise of any power of the petitioner to terminate the trusts or take the corpus had been made. (R. 21.)

The respondent, by an amended answer (R. 14-16), raised for the first time the contention that the petitioner had made a gift of the accumulated income of these trusts in each of the years from 1932 through 1935, by reason of his failure to exercise the power to take the corpus. No testimony was offered by the respondent on this issue. It was, however, stipulated that the trusts were created, and that none of the trusts had been in any respect modified, altered or revoked, prior to December 30, 1941. (R. 21.)

It was also stipulated that the trusts "are the same trusts as those involved in a proceeding before the Court wherein H. Smith Richardson, the present petitioner, was the petitioner, which proceeding is reported at 42 B.T.A. 830." (R. 21.)

The judge of the Tax Court held that the annual accumulation of the income in these trusts constituted a taxable gift by the petitioner for the year 1935, and in previous years. The Circuit Court of Appeals affirmed this decision. The judge who wrote the opinion said that he was "at a loss to understand how these accumulations of income set aside for the beneficiaries in the years 1933-1935 can constitute a completed gift by the petitioner accomplished in 1935, or indeed in any earlier year." (R. 203.) But the majority of the court, without discussion, concluded that the accumulations were gifts by the petitioner, and that his non-exercise of his power to terminate the trust "was not a release within the intendment of Section 452(c) of the Revenue Act." (R. 204.)

Assignment of Errors

The Circuit Court of Appeals erred:

1. In holding that the value of closely held stock, of which there had been no sales, was properly determined by giving no weight to any factor except the value of the assets held by the corporation in question.

2. In holding that the termination of a power created by another person constituted a gift by the donee of the power.

3. In holding that the termination of a power through failure to exercise it was not a release of the power within § 452(c) of the Revenue Act of 1942.

4. In holding that the Government had sustained the burden of proof which was on it to show that the income in question was subject to the petitioner's power.

Reasons for Granting the Writ

I

The Value of the Piedmont Stock

1. The decision with respect to the value of the Piedmont stock is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Laird* v. *Commissioner,* 85 F. (2d) 598, 600. In the *Laird* case, the Commissioner followed the method which has been approved here. He determined the value of stock for which no market quotations were available by valuing the underlying assets, and dividing the total valuation so obtained by the number of outstanding shares. This valuation was sustained by the Tax Court, but was reversed by the Circuit Court of Appeals. The court said (p. 601):

> This not only ignored the treasury regulations prescribing the method by which stock in close corporations should be valued, but directly violated these regulations. Stock in such a corporation must not be valued "by taking the mean between the highest and lowest quoted selling prices" of the stock constituting the assets of the corporation to determine the worth of the company and then dividing this by the number of shares outstanding . . . Neither the Commissioner nor the Board gave any consideration whatever to the earning and dividend-paying capacity of the Christiana and Delaware stock. Their method was arbitrary and contrary to the regulations.

The decision below is also in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *Weber* v. *Rasquin,* 101 F. (2d) 62, and *Commissioner* v. *McCann,* 146 F. (2d) 385, decided by different judges from those who considered the present case.

The decision below is also in direct conflict with the provisions of the applicable Treasury Regulations. The judge of the Tax Court has said that the value of the Piedmont stock can be obtained only "by primarily considering the value of the securities owned by the corporation. Any other approach would, in our opinion, be futile." (R. 61.) This is directly contrary to the Treasury Regulations, which provide (Regulations 79 (1936 ed.) art. 19(1), and 19(3), fifth paragraph):

> The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell.
>
> . . . . . .
>
> If the value of a security cannot be determined by sales, or from bid and asked prices, . . . then . . . the value is to be arrived at . . . in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock.

This language continues without change in the current regulations. Regulations 108, § 86.19(a), and 86.19(c), sixth paragraph. The Regulation gives no warrant for the assertion that "primary" consideration is to be given to net worth. It requires real consideration of the price at which the property would actually "change hands between a willing buyer and a willing seller," and also of "earning power, dividend-paying capacity, and all other relevant factors." To say that to give real and effective consideration to such factors is "futile" is not only wrong as a matter of law, but is a direct denial of the provisions of regulations of more than ordinary authority. Mere lip

service to these factors should not suffice. It is obvious that this error in standard must have affected substantially the conclusion reached by the judge of the Tax Court.

The decision below on this point was without discussion. No reason was given for the inapplicability of the decisions cited above or of the clear provision of the Regulations. The judge who wrote the opinion felt that "there is at least a substantial doubt as to whether the conclusion is based upon proper standards," and favored a remand to the Tax Court. (R. 201-202.)

It is recognized that this Court cannot undertake to make the general evaluation of evidence in valuation cases or in other cases, and that it should not do so if it could. But it does not follow that every valuation case should be cast upon an uncharted sea. This Court does have a function in determining the proper standards of valuation to be applied by the triers of the facts. As it said in *Powers* v. *Commissioner*, 312 U.S. 259, 260, "The question of what criterion should be employed for determining the 'value' of the gifts in question is a question of law."

The *Powers* case furnishes a clear illustration of the effectiveness of this Court's participation in this process. Prior to the *Powers* decision there was great doubt among the lower courts as to the proper standard to be applied in determining the value of an insurance policy for gift tax purposes. This uncertainty was entirely dissolved by the *Powers* decision. The question there at issue no longer has to be decided by courts and by administrative officers, and discrimination between taxpayers has been eliminated.

In the absence of an authoritative guide, valuation decisions become little better than a lottery. The result depends entirely upon the individual before whom the case

chances to come for decision. There is in this, of course, no reflection on the judges. Each does his conscientious best. But without a guide or standard to apply, the decisions become personal decisions, and the greatest divergency in result almost automatically follows. There are many aspects of valuation which ultimately must rest on individual judgment. But that is not true of the question which is presented in this petition. That question is one of the proper standard to be applied generally in cases involving the valuation of closely held stock. The determination of that standard by this Court would go far towards removing uncertainty and confusion in the determination of this question, and towards eliminating fortuitous discrimination among taxpayers which is the inevitable result of that uncertainty and confusion—to the end that we may have so far as humanly possible a government of laws and not of men.

II

Questions as to Gift Tax on Income of 1932 Trusts

2. In 1932, the petitioner's wife created five trusts for her children, giving the petitioner power to terminate the trusts. Nearly all of the income of the trusts was accumulated, and the petitioner did not terminate the trusts. Nevertheless, the tribunals below have held that his continuing failure to exercise the power to terminate amounted to an annual relinquishment of the power with respect to the income of the trusts, and that this annual relinquishment of power constituted a transfer by the petitioner by gift of each year's income.

The decision that the termination of a power over property created by another is a taxable gift is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Solomon*, 124 F. (2d) 86. In

that case, a woman had power to alter or amend a trust which was created (as to the part before the court) by her husband. In 1935 she relinquished or terminated this power. The Commissioner asserted that this termination amounted to a taxable gift. The Circuit Court of Appeals held that this termination of a power *created by another* was not a taxable gift.

In distinguishing *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, and related cases, the court said (124 F. (2d) at 90):

> But it is fundamental in those instances that the person with control over the property was either its owner or donor in the first instance.

To the same effect are the decisions in *Edith Evelyn Clark*, 47 B.T.A. 865, and *Estate of Gertrude Leon Royce*, 46 B.T.A. 1090. These decisions are of more than ordinary importance, because the Commissioner has formally announced his acquiescence in the conclusion reached in both. See 1942-2 Cum. Bull. 4, 16. They thus establish a settled administrative policy which is to be applied to taxpayers generally. That policy should be applied to this taxpayer.

The principle of these cases is directly applicable in the present case. Both the *Solomon* case and the present case involve gift tax liability. The most that the petitioner did here was to terminate a power over property, which is precisely what happened in the *Solomon* case. In the *Solomon* case the power was created by the taxpayer's husband, and that fact was held to be decisive. In the present case, the power was created by the taxpayer's wife. The parallel is thus complete. Only the decisions are divergent.

The basis of the decision of the Tax Court was that it has already been decided that the petitioner's possession of the power in question "made him, for tax purposes, the

owner of the trust property and taxable on its income."[2] (R. 63.) This is reading into the decisions already made with respect to this taxpayer far more than was ever decided there. It is true that the petitioner has been held taxable on the income of the trusts because of the power which was conferred on him. But it is not true that it has been decided that he was the owner of the property. That is simply contrary to the fact. His relationship to the property was that he had a power over it. That power has been held to be enough to make him taxable on the income, because income taxation generally follows power and control. But because the burden of income taxability was thrown on the petitioner does not make it follow that he is "the owner" of the property. To make the decision turn on such an assertion is to assume the point in issue. The fact is that the petitioner's relation to the property was that he had a power over it. The termination of such a power, conferred by another, is not a "transfer . . . of property by gift" for gift tax purposes.

There is strong evidence for this conclusion in the legislative history. The tax is sought to be imposed here under § 501(a) of the Revenue Act of 1932, which prescribed a tax on the "transfer . . . of property by gift." At the same time Congress enacted § 501(c) of the Revenue Act of 1932, as a partial definition of the transfers which were subjected to the tax. Section 501(c) thus amounts to a contemporaneous legislative definition of the scope of § 501(a). Section 501(c) (*infra*, p. 18) provided:

> The tax shall not apply to a transfer of property in trust where the power to revest *in the donor* title to such property is vested *in the donor*, . . . but the re-

[2] The reference is to *Richardson* v. *Commissioner*, 121 F. (2d) 1 (C.C.A. 2d, 1941), affirming, 42 B.T.A. 830, holding that the petitioner was taxable on the income of these trusts.

> linquishment or termination of *such* power (other than by *the donor's* death) shall be considered to be a transfer *by the donor* by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer *by the donor* of such income by gift. (Italics ours.)

Congress thus made it plain that the relinquishment of a power was a transfer of property only when the power had been *reserved* by the person who later relinquished it. The relinquishment of *donated* powers was not made taxable until the enactment of § 1000(c) of the Internal Revenue Code, added by § 452(a) of the Revenue Act of 1942 (*infra*, pp. 19-20). This provision is expressly inapplicable to gifts made before 1943. Revenue Act of 1942, § 451 (*infra*, p. 18). Where Congress has legislated with such particularity with respect to the relinquishment of powers, there is no basis for an extension of the liability so imposed by reliance only on the completely general provisions of the statute. *Helvering* v. *Safe Deposit & Trust Co.*, 316 U.S. 56.

The basis on which the court below decided does not appear. None of the cases or other material here mentioned was referred to in its opinion. Ignoring the taxpayer's arguments and authorities does not negative the existence of a clear conflict in the decision reached.

3. The decision below with respect to the construction and application of § 452(c) of the Revenue Act of 1942 is in conflict with the plain statements of the Committee Reports of both houses of Congress, and with the administrative interpretation of the statute by the Commissioner in his regulations.

Section 452(c) of the Revenue Act of 1942, as amended,[2] provides that—

> (c) Release on or before July 1, 1946.—
>
> (1) A release of a power to appoint before July 1, 1946, shall not be deemed a transfer of property by the individual possessing such power.
>
> (2) This subsection shall apply to all calendar years prior to 1946 and to that part of the calendar year 1946 prior to July 1, 1946.

(*a*) *Termination by lapse of time is a release.* The Report of the House Committee on Ways and Means on the Revenue Act of 1942 contains a clear legislative definition of what it meant by "release of a power."[3] The term was not confined to formal releases but included specifically a termination of a power through lapse of time. This appears from the following language in the report:

> A release of a power of appointment need not be express or formal in character. For example, the failure to exercise a power of appointment within a specified time, resulting in the termination of a power of appointment, is taxable if other conditions imposed by Section 811(f)(1) are present.

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[2] The most recent amendment is by the Act of June 29, 1945, Public Law 95, 79th Congress. See note 4, p. 20, *infra*.

[3] The power in question is clearly a "power to appoint." See § 86.2(b) of Regulations 108, set out at pp. 24-25, *infra*, particularly the reference to "a donee of a power of appointment who releases the power which he had received from another person," and the illustration: "For example, if a settlor transfers property in trust for the life of his wife with a power in the wife to appropriate or consume the principal of the trust, the wife has a power of appointment . . ." See also House Report No. 2333, 77th Cong., 2d Sess., pp. 160-161; Senate Report No. 1631, 77th Cong., 2d Sess., p. 323.

House Report No. 2333, 77th Congress, 2d Session, p. 161. The same language was repeated without change in the report of the Senate Finance Committee, clearly establishing Senate agreement on the question. See Senate Report No. 1631, 77th Congress, 2d Session, p. 233. Although the final form of the language which now appears as § 452(c) was not adopted until the Conference Committee acted on the Bill, that language was then formulated and enacted by Congress with the clear background of these Committee definitions.

The language of the Committee Reports has been incorporated by the Commissioner in his Regulations. Regulations 108, § 86.2(b), eighth paragraph; see pp. 24-25, *infra*. Congress has five times reenacted the statute since this regulation was issued.

It seems, therefore, to be wholly clear that when Congress used the word "release" it meant to use it broadly, and to make it applicable to any termination of a power through lapse of time. That construction of the word "release" is not merely clearly stated in the Committee Reports, but it is essential to the operation of the new statutory scheme of estate and gift taxation with respect to powers of appointment, which was the occasion for the enactment of § 452(c).

To hold that a termination of a power by lapse of time is not a "release" is therefore contrary to the clear terms of the legislative history and of the Commissioner's regulations.

(*b*) *Sec. 452(c) was intended to make plain that releases of donated powers prior to its enactment were not taxable as gifts.* When the Revenue Act of 1942 was reported to the Senate by the Finance Committee, it carried forward from the House Bill, with modifications, a new provision relating to the estate taxation of powers of appointment;

and express provision was made in § 402(d)(3) of the Bill with respect to powers which the decedent might release before he died. This, however, applied only to the estate tax. The accompanying Committee Report stated that the statute "should not be construed as a limitation upon the application of the existing *gift tax law* with respect to the exercise or release of a power of appointment." (Italics ours.) Senate Report No. 1631, 77th Congress, 2d Session, p. 243. If this form of the statute had stood, the provisions as to release of powers would have had no application to gift taxes.

When the bill went to Conference, however, the provisions as to release were substantially changed, and the present § 452(c) was added to the *gift tax* section. The Report of the Conference Committee expressly states that "Under the House Bill" releases prior to January 1, 1943 "might be held taxable under the existing gift tax statute, *and this amendment accordingly makes it clear that releases made before January 1, 1943, are not taxable under existing law.*" House Report No. 2586, 77th Congress, 2d Session, p. 71 (Amendment No. 418). (Italics ours.) Congress thus excepted from the gift tax *all* releases of powers prior to January 1, 1943, specifically declaring its intention (in the Conference Report) to change the existing law as to gift taxes.

The intention of Congress with respect to § 452(c) is strongly confirmed by the last sentence of § 1000(e) of the Internal Revenue Code (*infra*, pp. 22-23), added by § 502(a) of the Revenue Act of 1943. This language makes express provision so that that section shall not apply to the expiration of power over so-called interim income. The present case likewise involves "interim income"; but it does not involve *reserved* powers which are the subject of § 1000(e). The present case involves a *donated* power covered by § 452(c). There is no provision as to interim income in

§ 452(c). The fact that Congress did add such a provision to § 1000(e) shows that it understood that its terms would apply to the termination of powers over interim income unless it was restricted by the added language. See House Report No. 1079, 78th Congress, 2d Session, pp. 68-69 (*infra*, p. 23). Moreover, in § 1000(e) Congress has referred to a "relinquishment . . . by an exercise or other termination," thus formally declaring that an "other termination" is a form or method of relinquishment, and thus a release.

The court below completely ignored these clear indications of legislative intent. The basis of the court's decision does not appear from its opinion (see R. 204), but it can stand only on the ground that the termination of a power by lapse of time is not a release, or on the ground that a release of a power is taxable despite the clear provision of § 452(c) that it is not. In the presence of authoritative Congressional and administrative action on these questions, the court below was in error in giving the statute a contrary judicial construction. Such an ignoring of the acts of the coordinate branches of the Government warrants the intervention of this Court's supervisory power even more than in the case of a conflict of decisions between lower courts.

III

4. One of the grounds stated by this Court for the issuance of a writ of certiorari in paragraph 5(b) of its Rule 38 is "Where a Circuit Court of Appeals . . . has so far departed from the accepted and usual course of judicial procedure . . . as to call for an exercise of this court's power of supervision." The opinion in this case was written by a judge who did not concur in the judgment reached as to any of the points presented in this petition. The opinion accordingly gives virtually no indication of the reasons leading to the judgment of the majority. It vouchsafes neither to counsel nor to the taxpayer any clear indication of why the case was decided as it was. We recognize that certain cases under certain circumstances must be disposed of summarily, and often with brief opinions, or with no opinion. We see no reason to believe that this is such a case.

Wherefore, it is prayed that the writ of certiorari should be granted.

Respectfully submitted,
ERWIN N. GRISWOLD,
Counsel for the Petitioner.

December, 1945

Appendix

Statutes and Regulations Involved

Statutes

Section 501 of the Revenue Act of 1932 contains the following provisions:

Sec. 501 Imposition of Tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

. . . . . .

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

Sections 451 and 452 of the Revenue Act of 1942 read as follows:

Sec. 451. Gifts to which Amendments Applicable.

Except as otherwise expressly provided, the amendments made by this part shall be applicable only with respect to gifts made in the calendar year 1943, and succeeding calendar years.

Sec. 452. Powers of Appointment.

(a) GENERAL RULE.—Section 1000 (relating to imposition of gift tax) is amended by inserting at the end thereof the following new subsection:

"(c) POWERS OF APPOINTMENT.—An exercise or release of a power of appointment shall be deemed a transfer of property by the individual possessing such power. For the purposes of this subsection the term 'power of appointment' means any power to appoint exercisable by an individual either alone or in conjunction with any person, except—

"(1) a power to appoint within a class which does not include any others than the spouse of such individual, spouse of the creator of the power, descendants of such individual or his spouse, descendants (other than such individual) of the creator of the power or his spouse, spouses of such descendants, donees described in section 1004(a)(2), and donees described in section 1004(a)(2), and donees described in section 1004(b). As used in this paragraph, the term 'descendant' includes adopted and illegitimate descendants, and the term 'spouse' includes former spouse; and

"(2) a power to appoint within a restricted class if such individual did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of such individual, his estate, his creditors, or the creditors of his estate.

If a power to appoint is exercised by creating another power to appoint, such first power shall not be considered excepted under paragraph (1) or (2) from the definition of power of appointment to the extent of the value of the property subject to such second power to

appoint. For the purposes of the preceding sentence the value of the property subject to such second power to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint."

(b) POWERS WITH RESPECT TO WHICH AMENDMENTS NOT APPLICABLE.—

(1) The amendments made by this section shall not apply with respect to a power to appoint, created on or before the date of enactment of this Act, which is other than a power exercisable in favor of the donee of the power, his estate, his creditors, or the creditors of his estate, unless such power is exercised after the date of enactment of this Act.

(2) The amendments made by this section shall not become applicable with respect to a power to appoint created on or before the date of enactment of this Act, which is exercisable in favor of the donee of the power, his estate, his creditors, or the creditors of his estate, if at such date the donee of such power is under a legal disability to release such power until six months after the termination of such legal disability. For the purposes of the preceding sentence, an individual in the military or naval forces of the United States shall, until the termination of the present war, be considered under a legal disability to release a power to appoint.

(c) Release on or Before January 1, 1943.[4]—

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[4] The time stated in this statute has been extended five times: To July 1, 1943, by the Act of December 17, 1942, c. 740, 56 Stat. 1054; to March 1, 1944, by § 10 of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126; to January 1, 1945, by § 505 of the Revenue Act of 1943, c. 63, 58 Stat. 21; to July 1, 1945, by the Act of December 20, 1944, c. 616, 58 Stat. 830; and to July 1, 1946, by the Act of June 29, 1945, Public Law 95, 75th Congress. The full text of § 452(c) as most recently amended is set out on p. 13, above.

(1) A release of a power to appoint before January 1, 1943, shall not be deemed a transfer of property by the individual possessing such power.

(2) This subsection shall apply to all calendar years prior to 1943.

Section 501 of the Revenue Act of 1943 reads as follows:

Sec. 501. Valuation of Unlisted Stock and Securities For Estate Tax Purposes.

Section 811 (relating to gross estate) is amended (a) by striking out "(k)" at the beginning of subsection (k) and inserting in lieu thereof "(l)", and (b) by inserting after subsection (j) the following:

"(k) VALUATION OF UNLISTED STOCK AND SECURITIES.—In the case of stock and securities of a corporation the value of which by reason of their not being listed on an exchange and by reason of the absence of sales thereof, cannot be determined with reference to bid and asked prices or with reference to sales prices, the value thereof shall be determined by taking into consideration, in addition to all other factors, the value of stock or securities of corporations engaged in the same or a similar line of business which are listed on an exchange."

Section 502(a) of the Revenue Act of 1943 reads as follows:

Sec. 502. Certain Discretionary Trusts in Connection with Gift Tax.

(a) AMENDMENT OF THE INTERNAL REVENUE CODE.—Section 1000 of the Internal Revenue Code (imposing the gift tax) is amended by inserting at the end thereof the following:

"(e) CERTAIN DISCRETIONARY TRUSTS.—In the case of property in a trust created prior to January 1, 1939, if on and after January 1, 1939, no power to revest title to such property in the grantor could be exercised either by the grantor alone, or by the grantor in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, then a relinquishment by the grantor on or after January 1, 1940, and prior to January 1, 1945, of power or control with respect to the distribution of such property or the income therefrom by an exercise or other termination of such power or control shall not be deemed a transfer of property for the purposes of this chapter. If such property was transferred in trust, the grantor not retaining such power to revest title to such property in the grantor was relinquished, while a law was in effect imposing a tax upon the transfer of property by gift, this subsection shall apply only if (1) gift tax was paid with respect to such transfer or relinquishment, and not credited or refunded or a gift tax return was made within the time prescribed on account of such transfer or relinquishment but no gift tax was paid with respect to such transfer or relinquishment because of the deductions and exclusions claimed on such return, and (2) the grantor consents, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, for all purposes of this chapter to treat such transfer or relinquishment in the calendar year in which effected, and for all periods thereafter, as having been a transfer of property subject to tax under this chapter. This subsection shall not apply to any payment or other disposition of income occurring prior to the termination of power or

control with respect to the future disposition of income from the trust property."

COMMITTEE REPORTS

House Report No. 1079, 78th Congress, 2d Session, pp. 68-69, with respect to § 1000(e) of the Internal Revenue Code, added by § 502(a) of the Revenue Act of 1943, reads as follows:

> The first [amendment made by the Conference Committee] provides that the present rule whereby gift tax is imposed upon the payment of income to a beneficiary or upon some other disposition of the income is not affected as long as the grantor retains a power over future income from the trust property. For example, if a grantor created a trust in 1930, reserving a power to change the beneficiaries and their proportionate interests with respect to principal and income, but without retaining a power to revest the property in himself, and terminates his reserved power in 1944, so that he is no longer able to change the beneficiaries or their respective interests, the interim payment of income to any beneficiary or other surrender by the grantor of control over such income prior to such termination is nevertheless a taxable gift and to be treated accordingly. The same result follows if a similar trust was created while a gift-tax law was in effect and the grantor, prior to January 1, 1945, terminates the aforesaid reserved power, consenting to treat the original transfer in trust in the calendar year in which effected and for all periods thereafter as having been a transfer subject to gift tax.

The same language appears in the Commissioner's regulations under § 1000(e). T. D. 5366, 1944 Cum. Bull. 583, 585.

REGULATIONS

Regulations 108, relating to the gift tax, contains the following material in § 86.2(b) as most recently amended by T.D. 5471, Int. Rev. Bull., Sept. 11, 1945, p. 10:

(b). *Transfers under power of appointment.*—The exercise of a power of appointment after June 6, 1932, and before January 1, 1943, constitutes a gift by the individual possessing the power if the power is exercisable in favor of any person or persons or objects in whose favor the appointment may be made, if it is exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate. The release before July 1, 1946, of a power to appoint created on or before October 21, 1942, the date of enactment of the Revenue Act of 1942, is excepted from the application of the tax by reason of the express provisions of section 452(c) of the Revenue Act of 1942, as amended by Public Law 95 (79th Congress), approved June 29, 1945. . . . Section 452(c) of the Revenue Act of 1942, however, does not apply to any release of a power reserved directly or indirectly, by a donor upon a transfer, as distinguished from a donee of a power of appointment who releases the power which he had received from another person. . . .

The term "power of appointment" includes any power received by the appointor from another person which is in substance and effect a power to appoint regardless of the nomenclature used in creating the power and local property law connotations. For example, if a settlor transfers property in trust for the life of his wife with a power in the wife to appropriate or consume the principal of the trust, the wife has a power of appointment and the release of such a

power constitutes a taxable transfer. On the other hand, if, for example, a power of appointment with respect to the remainder, exercisable by the life tenant, is subject to the consent of the trustee who is a disinterested third party not receiving any beneficial interest upon such transfer, upon the exercise or release of the power by the life tenant no part of the gift of such remainder is attributable to the trustee personally. Similarly, if property is transferred in trust by a grantor reserving the power to alter, amend, revoke, or terminate the trust with the consent of the trustee who is a disinterested party not receiving any beneficial interest upon the transfer, the exercise or relinquishment of such power by the grantor with the consent of such trustee is not a taxable transfer by the latter. Ordinarily, powers of management with respect to property in trust, such as the determination of whether distributions shall be made annually or quarterly, the making of investments and reinvestments, or the determination of items of income or principal under recognized rules of accounting, are not powers of appointment over property under section 1000(c).

A power to appoint is exercised where the property subject thereto is appointed to the taker in default of appointment, regardless of whether or not the appointed interest and the interest in default of appointment are identical, and regardless of whether or not the appointee renounces any right to take under the appointment. For the purposes of section 1000(c), a release of a power of appointment need not be express or formal in character. For example, the failure to exercise a power of appointment within a specified time, resulting in the termination of the power of appointment, is taxable if the other conditions imposed by section 1000(c) are present.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 682

H. SMITH RICHARDSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 43–65) is not officially reported. The opinion of the Circuit Court of Appeals (R. 196–204) is reported in 151 F. 2d 102.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 17, 1945. (R. 205.) A petition for rehearing filed September 1, 1945 (R. 206), was denied on September 25, 1945 (R. 212). The petition for a writ of certiorari was filed on

December 19, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly determined for federal gift tax purposes, the value of closely held stock of Piedmont Financial Company, Inc., on December 20, 1935, the date the taxpayer made gifts thereof to his children by way of transfers in trust.

2. Whether the accumulation in 1935 for the benefit of taxpayer's children of income in trusts created in 1932 by taxpayer's wife wherein the taxpayer was made trustee with the power to revoke the trusts and vest title to the principal in himself constituted gifts of such income by taxpayer to his children within the meaning of Section 501 of the Revenue Act of 1932.

3. Whether the accumulation of the income for the benefit of the taxpayer's children in the 1932 trusts was not subject to a gift tax on the theory that such accumulation was by virtue of a "release of a power to appoint" within the meaning of Section 452 (c) of the Revenue Act of 1942, as amended.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 15–22.

STATEMENT

The facts with regard to the question of the fair market value, for gift tax purposes, of certain stock of Piedmont Financial Company, Inc., were in part stipulated and in addition certain expert testimony was introduced both by the taxpayer and the Government. The facts with regard to the question whether the taxpayer is subject to a gift tax as a result of the accumulation of the income in the trusts created by taxpayer's wife in 1932 were entirely stipulated. (R. 18–32.) As found by the Tax Court (R. 43–57), the facts relating to each of the questions presented may be summarized as follows:

1. On December 20, 1935, the taxpayer made five gifts in trust, one for the benefit of each of his children, of certain shares of capital stock of Vick Chemical, Inc.,[1] and of a total of 5,100 shares of capital stock of Piedmont Financial Company, Inc. (R. 43–44.)

In his gift tax return the taxpayer valued the Piedmont stock at $99.11 per share. The Commissioner determined that this stock had a fair market value on December 20, 1935, of $95.509 a share. Before the Tax Court, the taxpayer contended that the Piedmont stock had a fair market

[1] The question raised in the court below as to the valuation of the stock in Vick Chemical, Inc., is not presented in the taxpayer's petition for a writ of certiorari. (See Petition, p. 3, footnote 1.)

value on December 20, 1935, of not in excess of $50 per share. (R. 44.)

Piedmont Financial Company, Inc., was organized in 1925 and on December 20, 1935, had outstanding 100,000 shares of common stock of no par value, which had never been listed and was held by 33 stockholders, all of whom were members of the Richardson family, consisting of the taxpayer and his brother and the wife and family of each. The business of the corporation was chiefly that of investing its funds in stocks and securities of other companies. (R. 49.) Its portfolio of investments on December 31, 1935, consisted of securities having a cost or book value, which was not materially different on December 20, 1935, of $6,392,543.43. (R. 50–51.)

A tabulation of the mean prices at which securities owned by Piedmont sold on the stock exchange on December 20, 1935, is set forth in the findings. (R. 51–53.) As reflecting the market value of the securities owned by Piedmont, its stock was worth $98.08 per share on that date. (R. 24, 61.)

The net earnings of Piedmont ranged from $133,268.56 to $604,317.75 in the years 1927 to 1936, inclusive, except that in the year 1931 there was a loss of $296,333.57. In the year 1935, the total net earnings of the company were $323,-973.65. The net earnings per share in these years ranged from $1.33 to $6.04 per share, except that

in the year 1931 there was a loss of $2.96 per share. In the year 1935, the earnings per share were $3.24. In the same years, the dividends paid per share were as follows: None in 1927; $4.95 in 1928; $1.575 in 1929; none in 1930, 1931 and 1932; $2.85 in 1933; $4.35176 in 1934; $2.52 in 1935, and $0.7875 in 1936. (R. 53.)

The balance sheets of Piedmont as of June 30, 1934, 1935 and 1936 are included in the findings. (R. 53–54.)

An index to the testimony of the expert witnesses may be found at R. 88.

The Tax Court found that the fair market value, on December 20, 1935, of the 5,100 shares of Piedmont Financial Company, Inc., was not less than $95.509 per share (R. 54), and the Circuit Court of Appeals affirmed (R. 202).

2. On or about May 15, 1932, the taxpayer's wife made five transfers in trust to the taxpayer as trustee of an aggregate of 42,500 shares of Piedmont stock. The trust instruments were identical, except for the names of the several beneficiaries, who were the five children of the taxpayer and his wife. (R. 54.)

Each trust provided that the trustee should collect the trust income, and, until the beneficiary became twenty-one years of age, apply to the beneficiary's maintenance, education or benefit so much thereof as he, in his discretion, should deem advisable, the remainder to be accumulated and

reinvested for the child's benefit; after the beneficiary became twenty-one years old, the trustee should pay to him or her such portion of the annual trust income, or any part of the accumulation which he, in his discretion, might determine; and when the beneficiary became 35 years old, the trustee was to pay over all of the accumulations and income therefrom, to the beneficiary. Upon the death of the beneficiary, the trust should terminate and the principal and undistributed income should be delivered as the beneficary directed by last will and testament. (R. 54–55.) The trustee was given complete powers of management. (R. 55.)

Each agreement provided that, during his lifetime, the taxpayer "may cancel and terminate this agreement" and, in the event of his doing so, the corpus of the trust fund should absolutely vest in him free from all trusts. (R. 55.)

In 1935, $106,675 of income was accumulated and $900 was paid to the beneficiaries. (R. 56.)

On December 30, 1941, the taxpayer terminated the trusts and received in his individual right the 42,500 shares of Piedmont stock which had constituted the corpora of the trusts. (R. 56.)

The Tax Court found (R. 56) that the accumulation of the income for the benefit of the children named as beneficiaries in the trust instruments constituted taxable gifts from the taxpayer to such beneficiaries, and the Circuit Court of Appeals affirmed (R. 204).

ARGUMENT

1. The decision below with respect to the value of the Piedmont Financial Company, Inc., stock is correct and does not conflict with the decision of any other Circuit Court of Appeals, nor is it contrary to the Treasury Regulations.

The taxpayer's assertion (Pet. 6–8) of conflict between the decision below and the decision of the Circuit Court of Appeals for the Third Circuit in *Laird* v. *Commissioner,* 85 F. (2d) 598, and the Treasury Regulations, rests upon the assumption that the Tax Court, in determining the value of the Piedmont stock, gave no consideration to any other factor than the value of the assets owned by the Piedmont company. Contrary to the taxpayer's assumption, it is entirely clear from the Tax Court's opinion that it did not refuse or fail to give consideration to any other factor than the value of the Piedmont assets. The Tax Court said (R. 61):

> After having considered all of the relevant financial statistics and the facts disclosed by the record, including the opinions of the expert witnesses who testified herein, and having given due weight to those factors relevant and pertinent to the determination of the fair market value of this stock, we conclude that the stock of the Piedmont Financial Co. which was the subject of the gifts in question had, on December 20, 1935, a fair market value of not less than $95.509 per share.

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Among the facts disclosed by the record, and included within the Tax Court's findings, were the company's net worth, a history of its earnings, a history of its payment of dividends, and the company's balance sheets for three years, embracing the critical date. In the *Laird* case, *supra*, the Circuit Court of Appeals reversed the decision of the Board of Tax Appeals (now the Tax Court) because the Board did not give any consideration whatever to the earning and dividend-paying capacity of the stock there in question. In the present case, it is clear that the Tax Court did give consideration to such factors.

It is, of course, the duty of the Tax Court to weigh the evidence, and its decision will not be disturbed upon review if it is supported by substantial evidence and is in accordance with the proper standards of law. *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. The taxpayer does not attack the sufficiency of the evidence to support the Tax Court's finding of value, complaining only that the Tax Court failed to apply a proper standard of value. The majority of the court below were of the opinion that the Tax Court had used a proper standard (R. 202), and the decisions of that court in *Weber* v. *Rasquin*, 101 F. (2d) 62, and *Commissioner* v. *McCann*, 146 F. (2d) 385, which the taxpayer relies upon in the present case, demonstrate that that court recognizes as the proper standard

of value a rule which is in accord with the Treasury Regulations and with the decision of the Circuit Court of Appeals for the Third Circuit in the *Laird* case, *supra*. Neither the opinion of the court below in the present case, nor the opinion of the Tax Court, is contrary to those earlier decisions of the Second Circuit.

2. The decision of the court below affirming the holding of the Tax Court that the accumulation of income in the trusts created in 1932 by taxpayer's wife constituted gifts from the taxpayer to his children subject to gift tax is correct and there is no conflict among the Circuit Courts of Appeals.

The taxpayer here had the undisputed right to cancel and terminate the trust agreements and thereupon to receive the corpora of the trust funds absolutely and free from all trusts. (R. 55.) On December 30, 1941, subsequent to the year here involved, he in fact exercised this power and received in his own name and individual right the shares of stock which had constituted the corpora of the trusts. (R. 56.) Under the trust agreements the accumulations of income are to be paid over to the respective beneficiaries when he or she shall become thirty-five years of age. (R. 26, 55.) These accumulations of income could not be withdrawn by the taxpayer after they were set aside for his children (R. 21, 56), and so there is no question as to the com-

pleteness of the gifts if otherwise within the statute.

The position of the Commissioner, sustained below, is that the trust property was, for tax purposes, the property of the taxpayer. (R. 65.) In the case of *Richardson* v. *Commissioner,* 42 B. T. A. 830, affirmed, 121 F. (2d) 1 (C. C. A. 2d), certiorari denied, 314 U. S. 684, rehearing denied, 314 U. S. 714, it had already been held that the income of these trusts was taxable against the taxpayer as his income.[2] The basis of that decision was that the taxpayer's unfettered control over the corpora of these trusts was the equivalent of the ownership of the property for tax purposes. *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112.

Section 501 (a) of the Revenue Act of 1932 (Appendix, *infra*) imposes a tax upon the transfer of property by gift, and Section 501 (b) (Appendix, *infra*) provides that the tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. This language of the statute is broad enough to include property and property rights of every description, and the effort of Congress was to reach every kind and type of transfer by

[2] It was stipulated (R. 21) that the trusts in question in the present case created by the taxpayer's wife in 1932 are the same trusts as those involved in that case.

gift. *Smith* v. *Shaughnessy,* 318 U. S. 176; *Robinette* v. *Helvering,* 318 U. S. 184.

The control over the disposition of the income here involved which the taxpayer enjoyed by virtue of his control over or substantial ownership of the source of that income requires the conclusion that the transfer of that income constituted a gift from the taxpayer subject to a gift tax.

The case of *Commissioner* v. *Solomon,* 124 F. (2d) 86 (C. C. A. 3d), which the taxpayer asserts (Pet. 9–10) is in conflict with the present case, is distinguishable. In that case the court points out (pp. 89–90) that the taxpayer did not have as full dominion over the property as if she owned it because she could not have claimed the corpus of the trust for herself. It was this absence of ownership or control over the source of the income which the court relied upon as the distinguishing fact. In the present case, as has been pointed out, the taxpayer did control and, for tax purposes, was the owner of the source of the income here in question.

The acquiescence by the Commissioner in *Clark* v. *Commissioner,* 47 B. T. A. 865, referred to by the taxpayer (Pet. 10) as establishing a settled administrative policy, may not be regarded as an acceptance of the construction which the Board of Tax Appeals in that case placed upon the applicable gift tax provisions of the 1932 Act, but

only as an acceptance of the fact that the retroactive provisions of Section 452 (c) of the Revenue Act of 1942 (Appendix, *infra*) made the transfer nontaxable in any event. In that case the taxpayer had expressly amended the deed of trust by striking out the provision which had given her the unqualified power to amend the trust. The Commissioner had ruled that this amendment of the trust whereby the taxpayer relinquished the power over the trust corpus was in effect a transfer of that corpus to the successor beneficiaries named in the trust. While the decision of the Board of Tax Appeals in that case that the relinquishment of the right to amend the trust was not a gift within the gift tax provisions of the 1932 Act was deemed erroneous, it was thought that the transaction fell within the provisions of Section 452 (c) of the Revenue Act of 1942, made applicable to all calendar years prior to 1943, which were to the effect that a release of a power to appoint before January 1, 1943 (subsequently extended to July 1, 1946), shall not be deemed a transfer of property by the individual possessing such power.

The case of *Royce* v. *Commissioner,* 46 B. T. A. 1090, relied upon by the taxpayer (Pet. 10), involved a question of the federal estate tax and is not applicable here.

3. The present case does not, as argued by the taxpayer (Pet. 12–16), fall within the provisions

of Section 452 (c) of the Revenue Act of 1942. That section, as amended, as pointed out above, provides that a release of a power to appoint before July 1, 1946, shall not be deemed a transfer of property by the individual possessing such power.

Here the taxpayer had the power to cancel and terminate the trust agreements and upon such termination and cancellation to receive the corpora of the trust funds absolutely and free from all trusts. (R. 55.) The taxpayer never released this power, but in fact, in December, 1941, subsequent to the year here involved, exercised that power in his own favor and received in his own name and individual right the stock which had constituted the corpora of the trusts. (R. 56.)

There was also no release of a power of appointment over the interim income within the meaning of Section 452 (c) of the Revenue Act of 1942. This income is to be considered the income *of the taxpayer* because of his control over the disposition of the income which derives from his control of the source. That power was never released. That a time arrives when the taxpayer no longer has control over the income does not signify a release of a power to appoint within the meaning of Section 452 (c) any more than does the loss of control over any property which has been the subject of a gift. It merely attests the completeness of the gift.

The fact that Section 452 (c) of the Revenue Act of 1942 has no express provision relating to interim income similar to the provision in Section 1000 (e) of the Internal Revenue Code, added by Section 502 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21, relating to the estate tax, does not indicate that Congress intended to exempt from the operation of the gift tax statute interim income which is the subject of a taxpayer's disposition by virtue of a taxpayer's continued control over the source of that income. Cf. *Burnet* v. *Guggenheim*, 288 U. S. 280.

CONCLUSION

The decision below is correct; there is no conflict of decisions; and the case does not call for further review.

Respectfully submitted.

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JANUARY 1946.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 451. GIFTS TO WHICH AMENDMENTS APPLICABLE.

Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to gifts made in the calendar year 1943, and succeeding calendar years.

SEC. 452. POWERS OF APPOINTMENT.

(a) *General Rule.*—Section 1000 (relating to imposition of gift tax) is amended by inserting at the end thereof the following new subsection:

"(e) *Powers of Appointment.*—An exercise or release of a power of appointment shall be deemed a transfer of property by the individual possessing such power. For the purposes of this subsection the term 'power of appointment' means any power to appoint exercisable by an individual either alone or in conjunction with any person, except—

"(1) a power to appoint within a class which does not include any others than the spouse of such individual, spouse of the creator of the power, descendants of such individual or his spouse, descendants (other than such individual) of the creator of the power or his spouse, spouses of such descendants, donees described in section 1004 (a) (2), and donees described in section 1004 (b). As used in this paragraph, the term 'descendant' includes adopted and illegitimate descendants, and the term 'spouse' includes former spouse; and

"(2) a power to appoint within a restricted class if such individual did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of such individual, his estate, his creditors, or the creditors of his estate.

If a power to appoint is exercised by creating another power to appoint, such first power shall not be considered excepted under paragraph (1) or (2) from the definition of power of appointment to the extent of the value of the property subject to such second power to appoint. For the purposes of the preceding sentence the value of the property subject to such second power to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint."

(b) *Powers With Respect to Which Amendments Not Applicable.*—

(1) The amendments made by this section shall not apply with respect to a power to appoint, created on or before the date of enactment of this Act, which is other than a power exercisable in favor of the donee of the power, his estate, his creditors, or the creditors of his estate, unless such power is exercised after the date of enactment of this Act.

(2) The amendments made by this section shall not become applicable with respect to a power to appoint created on or before the date of enactment of this Act, which is exercisable in favor of the donee of the power, his estate, his creditors, or the creditors of his estate, if at such date the donee of such power is under a

legal disability to release such power, until six months after the termination of such legal disability. For the purposes of the preceding sentence, an individual in the military or naval forces of the United States shall, until the termination of the present war, be considered under a legal disability to release a power to appoint.

(c) *Release on or Before January 1, 1943.*—

(1) A release of a power to appoint before January 1, 1943, shall not be deemed a transfer of property by the individual possessing such power.

(2) This subsection shall apply to all calendar years prior to 1943.

(26 U. S. C. Supp. IV, Sec. 1000.)

Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 505. EXTENSION OF TIME IN CONNECTION WITH RELEASE OF POWERS OF APPOINTMENT.

Section 403 (d) (3) of the Revenue Act of 1942 is amended by striking out "March 1, 1944" wherever it appears and inserting in lieu thereof "January 1, 1945"; and section 452 (c) of the Revenue Act of 1942 is amended to read as follows:

"(c) *Release Before January 1, 1945.*—

"(1) A release of power to appoint before January 1, 1945, shall not be deemed a transfer of property by the individual possessing such power.

"(2) This subsection shall apply to all calendar years prior to 1945.

Treasury Regulations 79 (1936 ed.):

ART. 19 [as amended by T. D. 4901, 1939–1 Cum. Bull. 341–342]. *Valuation of property* (1) *General.*—The statute provides

that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

* * * * *

(3) *Stocks and bonds.*—The value at the date of the gift in the case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on such date.

In the case of stocks and bonds listed on a stock exchange the mean between the highest and lowest quoted selling prices on the date of the gift shall be considered as the fair market value per share or bond. If there were no sales on the date of the gift, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the

date of the gift. For example, assume that sales of stock nearest the date of the gift (June 15) occurred two days before (June 13) and three days after (June 18) and that on such days the mean sale prices per share were $10 and $15, respectively. The price of $12 shall be taken as representing the fair market value of a share of such stock as of the date of the gift. If, however, on June 13 and June 18 the mean sale prices per share were $15 and 10, respectively, the price of $13 shall be taken as representing the fair market value of a share of such stock as of the date of the gift. If the security was listed on more than one exchange, the records of the exchange where the security is principally dealt in should be employed. In valuing listed stocks and bonds the donor should observe care to consult accurate records to obtain values as of the date of the gift.

In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling prices as of the date of the gift; or, if there were no sales on that date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift. If quotations are obtained

from brokers, or evidence as to the sale of securities is obtained from the officers of the issuing companies, the donor should preserve in his files the letters furnishing such quotations or evidence of sale for inspection when the return is verified by an investigating officer.

If actual sales are not available during a reasonable period beginning before and ending after the date of the gift, the fair market value may be determined by taking the mean between the bona fide bid and asked prices on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift.

If actual sale prices or quoted bona fide bid and asked prices are available on a date within a reasonable period prior to the date of the gift, and if no actual sale prices or bona fide bid and asked prices are available on a date within a reasonable period after the date of the gift, or vice versa, then the mean between such highest and lowest available sale prices or bid and asked prices may be taken as the value.

If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth,

earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon which the donor bases his valuation should be submitted with the return.

In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value.

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No. 682

Supreme Court of the United States,

OCTOBER TERM, 1945

H. SMITH RICHARDSON
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I

1. The Government asserts that there is no conflict with the decision in *Laird* v. *Commissioner*, 85 F. (2d) 598 (C.C.A. 3d), and that our contention that there is "rests upon the assumption that the Tax Court, in determining the value of the Piedmont stock, gave no consideration to any other factor than the value of the assets owned by the Piedmont company." In support of this position, the Government quotes (Br. 7) certain general language from the opinion of the single judge of the Tax Court. (R. 61.)

This argument, we submit, is purely formal; the very language used by the Tax Court judge shows how formal it is. Here the judge of the Tax Court made very plain the basis on which his valuation was actually made. He

said that that value was obtained "by primarily considering the value of the securities owned by the corporation." Indeed, he went further and said: "*Any other approach* would, in our opinion, be futile." (R. 61; italics ours.) Immediately following this, he said: "*As reflecting the market value of the securities owned by the Piedmont Financial Co.*, its stock was worth $98.08 per share." (R. 61; italics ours.) But the highest value claimed by the Commissioner was $95.509 per share; and the conclusion of the Tax Court judge was then stated that the stock was worth "not less than $95.509 per share." In this context, it can hardly be contended that any factor was actually given any weight by the judge except the value of the underlying assets. He said, quite emphatically, that any other approach would be futile. A valuation reached on that basis is directly contrary to the decision in the *Laird* case.[1] To say that the valuation was not reached on that basis is to allow formal general language to obscure what was actually done, and to ignore the plain meaning of what the Tax Court judge himself said.

II

2. The Government's treatment of the question whether the income of the trusts created in 1932 by the petitioner's wife is to be taxed as a gift by the petitioner is based entirely upon assertion, and a failure to regard the actual

[1] That the distinction is a real one is graphically illustrated by what happened in the *Laird* case. In its first decision (*Laird* v. *Commissioner*, 29 B.T.A. 196), the Board sustained a value of $1760.60 per share. Following the decision of the Circuit Court of Appeals, the Board, speaking through the same member, found the value to be $1000 per share. *Laird* v. *Commissioner*, 38 B.T.A. 926. This final decision was made after taking into account all relevant factors. The striking difference in the values reached shows the clear error in giving weight only to the value of the underlying assets.

facts which are before the Court. The Government says that "The position of the Commissioner, sustained below, is that the trust property was, for tax purposes, the property of the taxpayer." (Br. 10.) But this is in the teeth of the stipulated facts, which show, without dispute, that the petitioner's relation to the property was that he had a power over it. (R. 20-21.) To assert that the petitioner was "the owner" of the property is simply to beg the question at issue. It is precisely the argument which this Court rejected in *Helvering* v. *Safe Deposit & Trust Co.*, 316 U.S. 56.[2]

Where Congress legislates in general terms, as in § 22(a) of the Code, relating to income tax, then it may be correct to talk about a relationship to property as being the equivalent, for tax purposes, of ownership. But where Congress has enacted highly articulated provisions with respect to the effect of powers, that legislation should not be brushed aside with an illusory phrase that cannot be more than "an anodyne for the pains of reasoning."

The Government undertakes to distinguish *Commissioner* v. *Solomon*, 124 F. (2d) 86 (C.C.A. 3d), but fails to point out that the reasoning in that case is completely contrary to the present decision (for which no reasons were given). In the *Solomon* case, as pointed out in the petition, the court said that it was "fundamental" in the cases where the termination of a power had been held to consti-

[2] The following passage is typical of the argument presented by the Government in its brief in the *Safe Deposit & Trust* case:

"Under the rationale of the *Clifford* case, therefore, decedent, who was for all practical purposes the owner of the trust property at the time of his death, was properly treated as its owner for tax purposes." Brief for the Petitioner, p. 37, in *Helvering* v. *Safe Deposit & Trust Co.*, No. 600, October Term, 1941.

This is the same argument as that now made in the present case. But it ignores the whole structure of the statutory provisions applicable to the special problem of powers, and should be no more successful here than it was in the *Safe Deposit* case.

tute a gift "that the person with control over the property was either its owner or donor in the first instance." That reasoning is directly applicable here.

The effort to distinguish the decision in *Edith Evelyn Clark*, 47 B.T.A. 865, and the Commissioner's formal acquiescence in that decision (1942-2 Cum. Bull. 4), serves only to emphasize its applicability here. It is said (Br. 12) that "it was thought that the transaction fell within the provisions of Section 452(c) of the Revenue Act of 1942, made applicable to all calendar years prior to 1943, which were to the effect that a release of a power to appoint before January 1, 1943 (subsequently extended to July 1, 1946), shall not be deemed a transfer of property by the individual possessing such power." That is precisely the provision which is relied on here.

No effort is made to distinguish the case of *Estate of Gertrude Leon Royce*, 46 B.T.A. 1090, in which the Commissioner has also formally acquiesced. 1942-2 Cum. Bull. 16. The mere fact that that case arose under the estate tax is no distinction. The estate tax is imposed on "the transfer of the net estate." Internal Revenue Code, § 810. The gift tax, involved here, is imposed on "the transfer of property by gift." Revenue Act of 1932, § 302(a). In each case the controlling statutory word is the same. There must be a "transfer." In the *Royce* case the decedent was given a power which is not distinguishable from the power here. She could take "such amounts of the principal of the trust estate as she may request in writing, even to the exhaustion thereof." The termination of that power through failure to exercise it was held not to be a *transfer* of the property subject to the power within the proper construction of the statute. In the present case we have the same question. The most that happened was that a power over property held by the petitioner terminated through his failure to exercise it. If such a termination was not a

transfer in the *Royce* case, it cannot consistently be a transfer here. The *Royce* case is not just another decision of the Board of Tax Appeals. It is a decision in which the Commissioner has formally published his acquiescence. 1942-2 Cum. Bull. 16. A decision in conflict with such a publicly announced settled policy merits the consideration of this Court if there is to be anything of consistency in the administration of our tax laws.

3. In its treatment of § 452(c) of the Revenue Act of 1942 (Br. 12-14), the Government does not even mention the clear provisions of the Committee Reports and of the Regulations. This can only be taken as a confession of the difficulty of the Government's position on this point.

The Government says (Br. 13): "That a time arrives when the taxpayer no longer has control over the income does not signify a release of a power to appoint within the meaning of Section 452(c) . . ." But Congress has expressly declared the contrary. Both the House and Senate Committees have said in terms that "A release of a power of appointment need not be express or formal in character." And this illustration is given: "For example, the failure to exercise a power of appointment within a specified time, resulting in the termination of a power of appointment, is taxable . . ." House Report No. 2333, 77th Congress, 2d Session, p. 1661; Senate Report No. 1631, 77th Congress, 2d Session, p. 233. And this is not all. The Commissioner himself has put this very language in his own Regulations. Regulations 108, § 86.2(b), eighth paragraph; quoted on p. 25 of the petition. The Government should not be allowed to blow hot and cold on this question, relying on the Committee Reports and the Regulations to tax future terminations of powers, and ignoring them completely here where a prior termination is involved, and § 452(c), allowing tax-free releases, is applicable.

The Commissioner's Regulations also provide: "For example, if a settlor transfers property in trust for the life of his wife with a power in the wife to appropriate or consume the principal of the trust, the wife has a power of appointment and the release of such a power constitutes a taxable transfer." Regulations 108, § 86.2(b). There is a similar provision in the corresponding estate tax regulation. Regulations 105, § 81.24(b)(1), as amended by T.D. 5239, 1943 Cum. Bull. 1081, 1088. These provisions relate to prospective releases of powers after the release date prescribed in § 452(c) of the Revenue Act of 1942 has expired. But that date has not yet expired, and that section is fully applicable in the present case. The Commissioner's position in his Regulations with respect to such powers is wholly inconsistent with his position here.

Where the legislative declaration is clear as it is here, and the administrative action in formal Regulations is in full accord, the ignoring of legislative mandate and administrative rule in a case where they happen to operate against the Government becomes a matter fully within the proper scope of this Court's supervisory power.

III

The petitioner again refers to the manner in which this case was disposed of in the court below. One of the great contributions of Anglo-American justice has been the development of a high tradition of giving reasons for the disposition of cases. That tradition was not adequately met in this case.

Respectfully submitted,

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January, 1946.